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Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
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No. 71-237

VINCENT R. MANCUSI, Warden of
Attica Correctional Facility,

Petitioner,

against

WILLIAM C. STUBBS,

Respondent.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions and Orders Below

The orders of the United States Court of Appeals denying the petition for rehearing and rehearing *in banc* are reproduced as Appendix A and Appendix B to the petition for writ of certiorari in the within case. The opinion of the United States Court of Appeals for the Second Circuit is reported at 442 F. 2d 561 and appears in the Appendix at p. 23. The opinion of the United States District Court for the Western District of New York is not reported and is appended to the petition as Appendix D.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on April 19, 1971 reversing the denial of

respondent's petition for a writ of habeas corpus by the United States District Court for the Western District of New York. A petition for rehearing or rehearing *in banc* was denied by the Court of Appeals on May 19, 1971. The petition for certiorari was filed on August 16, 1971. Certiorari was granted on January 10, 1972.

Questions Presented

1. Whether the rule requiring due diligence in obtaining the presence of an absent witness is met when it is established that a 72-year-old witness is a permanent resident of a foreign country, 4000 miles from the situs of the trial in question?

2. Whether respondent's right of confrontation was violated at his second trial for murder by the introduction of the prior recorded testimony of an unavailable witness, where that testimony had been subject to cross-examination by competent counsel at respondent's first trial but the trial had later been vacated because counsel had been tardily appointed?

3. Whether the introduction of prior recorded testimony at respondent's second trial was harmless beyond a reasonable doubt, where respondent himself testified at the retrial that he had forced the murder victim and her husband into a car at gunpoint and compelled them to drive to the spot where the shooting occurred?

4. Whether the claimed trial errors were prejudicial because counsel at respondent's first trial did not cross-examine a witness on whether the stranger who kidnapped him at gunpoint later became his guest?

Statement

A

Respondent was convicted in Monroe County, New York in 1966 for assault in the first degree and possession of a firearm. On October 7, 1966 he was sentenced as a second offender to a term of 19-20 years on the assault charge, and 13-14 years on the firearms charge, the sentences to run consecutively.

On June 24, 1968 the Appellate Division, Fourth Department affirmed the conviction without opinion (30 A.D. 2d 777) and reargument was denied on September 19, 1968 (30 A.D. 2d 932). Leave to appeal was subsequently denied by the New York Court of Appeals. On February 24, 1969, this Court denied certiorari. (393 U.S. 1108).

The increased punishment imposed upon respondent by the Monroe County Court was predicated upon a 1964 Tennessee conviction upon retrial for first degree murder committed on June 11, 1954. Respondent had originally been convicted of the same murder charge in July 1954; however, the original conviction had been reversed by the United States District Court for the Middle District of Tennessee on January 6, 1964 in a habeas corpus proceeding on the grounds of tardy appointment of counsel. *Stubbs* v. *Bomar* (Civil Action 3585, M.D. Tenn.).

B

The crime of which appellant Stubbs was convicted in Tennessee was the murder of Mrs. Alex Holm on June 11, 1954. At the 1964 retrial, Burl A. Holm* testified that his parents, Alex and Ruby Holm were driving their car from their home in Texas through Tennessee; their destination was Providence, Rhode Island, and from that point, they

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* Spelled Holmes in the trial transcript.

were to fly to Sweden (Tr. 59).* He stated that his father now resided in Ekskogen, Sweden (Tr. 59).

Stubbs testified that he had been discharged from Texas State Penitentiary in June 1954 (75a)** and that he was without money and was hitchhiking through the South (76a). He had been given a gun (76a) by a friend who had been a fellow inmate in prison (93a) and had this gun in his possesison when he met Mr. and Mrs. Holm (81a). After their refusal to give him a lift (81a), he forced them at gunpoint to get into the back seat of their car (81a, 96a). With the gun in his hand at intervals pointing into Mrs. Holm's face (97a) or on the front seat (97a), Stubbs drove the car through Rogersville, Kingsport and Blountville, Tennessee (83a, 84a). Stubbs testified that near Bristol, Tennessee (85a):

> "It seems awful strange, but everything just seemed to be awful still and I remember a tree and it just seemed to come up just like that in a clear focus, but in a reddish haze. I mean there was no pain or nothing . . . I felt a sharp pain that seemed to start in my head and go all the way down through me and I reached up with both hands and heard this loud roar, bang . . . Stuff started down my face and down my shirt and all that I could think of is that he has got the gun . . . I just went outside through the car door [onto the highway]."

After that, Stubbs ran away to the woods, "everything went black" and he awoke after sundown (86a). A

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* References to pages in the transcript of respondent's 1964 Tennessee trial, which is part of the record before this Court, will be prefaced Tr.

** Stubbs' 1964 testimony is reproduced in its entirety in the appendix, and page references to the appendix will be followed by "a".

passing driver, Mr. Bernie Webb* gave him a lift (87a) and they were stopped at a roadblock (87a). Mr. Webb suggested to officers at the roadblock that Stubbs be investigated (88a). He was taken to Bristol Jail in handcuffs (88a), then escorted within an hour to the hospital where several head wounds were treated (88a).

Stubbs went on to state that he was taken to Mr. Holm's room in the hospital and that a man (whom he did not recognize as Holm at the time) pointed to him and said: "[T]hat is the one" (89a). He denied knowledge that Mrs. Holm was dead, claiming that he was hit on the head and that he did not shoot Mrs. Holm (89a, 99a).

Captain Frank Williamson of the Tennessee Highway Patrol testified that on June 11, 1954 he received information about a wrecked car near Blountville. He went to the scene and found an old model Ford with blood inside and the door open (Tr. 22). A woman had been shot and a man injured (Tr. 23).

Sergeant Seahorn of the Tennessee Highway Patrol testified that after the shooting they were checking cars at a highway roadblock and that when Mr. Webb and respondent Stubbs drove up, Stubbs was arrested (Tr. 78). Sergeant Seahorn told Stubbs that he was under arrest in connection with a murder (Tr. 82). At the time, respondent had blood on the front of his shirt and his clothes were torn. He explained this blood by saying that he had been fishing and had fallen off a rock cliff (Tr. 79). He was searched, and an empty bullet shell and knife were found (Tr. 80). Sergeant Seahorn further testified that Stubbs was taken to City Jail and then to the hospital room of Alex Holm, where (in the presence of several other police officers) Holm pointed at Stubbs and identified him (Tr. 80).

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* Mr. Webb testified that he had picked Stubbs up on the highway, that his shirt was bloody and that they were stopped by the roadblock (Tr. 63-73).

Their testimony was corroborated by Captain Williamson (Tr. 26, 30) and Sergeant H. P. Montgomery of the Tennessee Highway Patrol (Tr. 86-89). Sergeant Montgomery further said that at the time that Holm identified Stubbs, there was ample light in the room (Tr. 94).

Dr. Franklin Buchanan, who attended Alex Holm in the Emergency Room of Memorial Hospital, testified that two bullets had entered Mr. Holm's face, one lodging in the neck, and the other in the nasal passage; both bullets were removed (Tr. 133-134). Despite this injury and the discomfort, Mr. Holm's faculties were intact and his eyes were good; he had brought his glasses with him to the hospital (Tr. 134-135). He identified Stubbs as his assailant (Tr. 135). Dr. Charles Harkrader, Jr., testified to the same effect as to Holm's conscious and rational state (Tr. 139).

The testimony of Alex Holm, given at Stubbs' 19[illegible] trial, was read into the transcript at the 1964 trial, over counsel's objections; Mr. Holm had in the meantime become a permanent resident of Sweden (Tr. 59). Holm had identified Stubbs in court (43a)* and had testified that Stubbs had forced him and his wife into their car at gunpoint and threatened to kill them (44a). Stubbs drove the car, keeping his gun in his left hand pointed towards them at all times (45a). Mr. and Mrs. Holm were carrying $1,400.00 in traveler's checks and cash (47a). No friendly relations developed between them (104a). Stubbs began shooting when they were slightly east of Blountville (50a), twice at Holm and once at Mrs. Holm (52a). Holm seized the gun after Stubbs had begun to shoot (52a), another shot went off (52a), and Holm hit Stubbs on the head with the gun 3 or 4 times (55a). Mrs. Holm's body slumped over (55a) and Stubbs got out of the car and ran away (55a).

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* Holm's testimony as read into the 1964 transcript is reproduced in its entirety in the Appendix, and page references to the Appendix will be followed by "a".

C

Respondent commenced the instant proceeding in the Western District of New York by means of a petition for a writ of habeas corpus. His petition contained ten claims, nine of them directed toward his Monroe County trial and conviction. Respondent's tenth claim was that the 1964 Tennessee conviction was unconstitutionally obtained and as such should not have been made the basis for increased punishment (3a). Respondent alleged that the 1964 Tennessee conviction had been obtained in violation of his Sixth Amendment right of confrontation.

After having examined the record on appeal in the New York Courts, the District Court on June 30, 1969, denied all of respondent's claims on the merits (see Appendix D, petition for writ of certiorari). On October 7, 1969 the Court of Appeals for the Second Circuit granted respondent a certificate of probable cause, leave to appeal *in forma pauperis* and assignment of counsel. The Court limited the issue on appeal to the constitutionality of the 1964 Tennessee conviction (22a).

On April 19, 1971, the Court below rendered its decision, reversing the decision of the United States District Court. The Court held that respondent had been deprived of his right of confrontation at the Tennessee retrial for murder, because the testimony of a witness proven to be residing in Sweden was read into the record, and because counsel at the first trial had been tardily appointed and had not attempted to establish by cross-examination that after Stubbs had kidnapped the Holms at gunpoint, they had made him welcome as a "guest." This absence of questioning on the "guest" theory could not be harmless error (28a).

The dissenting judge, Hon. Leonard P. Moore, terming the majority decision "an extraordinary example of 'justice' dispensed by the federal courts" (29a), pointed out that Stubbs had kidnapped Mr. and Mrs. Holm at gunpoint

and forced them to accompany him in their car to the spot on the road where the shooting occurred. Holm had testified in 1954 as to the kidnapping, the murder of his wife, and his own wounding. Judge Moore found that Stubbs' arguments about lack of confrontation were "a smoke-screen" (31a), since counsel cross-examined Holm and the issues and facts were not complex. He further noted that Stubbs was not seeking relief from his Tennessee conviction as such but simply from its use as a predicate for a longer sentence* (31a).

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*In his brief in opposition to the petition for writ of certiorari, respondent suggested that the case at bar was moot because he was to be resentenced as a second felony offender in the Monroe County Court, on the basis of a 1953 Texas conviction. This contention is easily rebutted by established case law and the Penal Law of New York. This Court held in *Sibron* v. *New York*, 392 U.S. 40, 55 (1968) that even where a sentence is already served, the issue cannot be viewed as moot because collateral disabilities and the possibility of a higher penalty upon subsequent conviction are involved. See *United States* v. *Morgan*, 346 U.S. 502, 512 (1958); *Pollard* v. *United States*, 352 U.S. 354 (1957). Under New York Law, the Tennessee conviction is of particular significance not only for impeachment purposes but also in relation to the sentence in any subsequent conviction. § 70.10 of the Penal Law (McKinney's 1967) provides for discretionary sentences of fifteen years to life imprisonment for persistent felony offenders—the same sentence authorized for a Class A felony under § 70.00-2(a). Among the factors which the court is required to consider in exercising its discretion are 1) the history and character of the defendant 2) the nature and circumstances of his criminal conduct. Since the Tennessee conviction involved a brutal murder committed only seven days after release from the Texas penitentiary, it would be central in the sentencing court's assessment of the period needed for rehabilitation and for protection of the public interest.

POINT I

Barber v. _Page_, 390 U.S. 719 (1968), which concerned reading of preliminary hearing testimony of a witness imprisoned in another state, was not violated by use of prior testimony of a witness permanently domiciled on a foreign continent.

The court below, in an erroneous application of this Court's decision in *Barber* v. *Page*, 390 U.S. 719 (1968), held that the prior recorded testimony of an elderly witness of Swedish nationality who had permanently returned to Sweden, could not be used at respondent Stubbs' Tennessee retrial for first degree murder. It was held that due diligence had not been exercised to obtain the presence of the witness. This holding would invalidate the Tennessee conviction and preclude its use as a predicate for finding respondent a second felony offender after conviction in Monroe County, New York, of first degree assault and possession of a firearm.

The ruling in *Barber* was that a good-faith effort should have been made to have the witness present. At Stubbs' 1964 retrial, the prosecution ascertained the location of the missing witness and introduced evidence as to his whereabouts (Tr. 59). As further verification, a subpoena was also directed to his former residence in Texas (Tr. 39, 118). In the context of a witness who is domiciled outside the jurisdictional reach of the states, the Federal government and the territories of the United States, these prosecution efforts satisfy the good faith requirement. As the Supreme Court of Tennessee observed in affirming Stubbs' conviction (*Stubbs* v. *State*, 216 Tenn. 567, 393 S.W. 2d 150, 154):

> "The Uniform Law to Secure Attendance of Witnesses, T.C.A. § 40-2429 et seq., is limited to apply to any state, territory of the United States or District of Columbia. The Criminal Court of Sullivan County, who tried Stubbs, had no effective or compulsory process in Ekskogen, Sweden."

By contrast, *Barber* involved the reading of preliminary hearing testimony of a witness who was at that time in a federal prison 225 miles from the trial court. This Court noted that increased cooperation between the Federal government and the States had factually undercut the theory that the process of a trial court could not go beyond State borders. It is clear that the decision concerned a situation in which it was legally and physically possible to produce the absent witness. Indeed, this Court observed that in the case of prospective witnesses in federal custody, federal courts had the power to issue writs of habeas corpus *ad testificandum* at the request of state prosecutors, and that the United States Bureau of Prisons permitted federal prisoners to testify in state court criminal proceedings pursuant to issuance of such writs by state courts. This Court then referred to the duty of requesting "an exercise of discretion on the part of federal authorities" (390 U.S. at 724), *not* of making a request to the witness.

Several recent decisions demonstrate that proof that a witness is living on a foreign continent at the time of trial is sufficient to establish unavailability. The Fifth Circuit ruled on this question in *United States* v. *Mobley*, 421 F. 2d 345, 351 (1970), where the earlier testimony of a witness was used in defendant's retrial for robbery, theft, assault and murder. The witness refused to testify at the retrial, because of a mistaken interpretation of the Fifth Amendment. The court, after a discussion of *Barber*, held that the witness was

> "no less unavailable than [witnesses in cases involving] death or *absence from the country* or physical inability to speak." (emphasis added)

And in *People* v. *Benjamin*, 83 Cal. Rptr. 764 (Ct. of App. 1970), defendant claimed at his trial for robbery in the second degree, that the introduction of preliminary hearing testimony of a missing witness violated his right

of confrontation. The prosecution showed that it had been advised by a legal officer of the Marine Corps that the missing witness was on military duty in Vietnam and would be unavailable for trial. On the basis of this evidence, the Court of Appeals upheld the trial judge's finding that the witness was unavailable as a matter of law. Accordingly, the admission of the witness' pre-trial testimony was found to be proper.

The unavailable witness in *People* v. *Ashford*, 71 Cal. Rptr. 619 (Ct. of App. 1968), had testified against defendant in a retrial for robbery in the second degree, and been cross-examined at a preliminary hearing and a prior trial. At the time of defendant's second trial, the missing witness was at a convention in Florida, and was thereafter planning to travel in the Caribbean and in the western United States. While the court noted that the better practice would have been to adjourn the second trial until the witness returned to California, it upheld defendant's conviction on the ground that he was not deprived of his full Sixth Amendment right of confrontation, but only the opportunity to have the trier of fact observe the witness' demeanor while being subjected to interrogation.

In *Goldwasser* v. *Brown*, 417 F. 2d 1169 (D.C. Cir. 1969), a former English teacher sought review of a proceeding in which he was discharged from civilian service with the Air Force for having made unauthorized statements to his students. The students were foreign military officers who had subsequently returned to their native countries at the time the disciplinary hearing took place. Notwithstanding plaintiff's argument that the hearing was defective because these witnesses should have been produced by the Air Force upon his request, the court stated that plaintiff's access to these witnesses prior to their departure from the United States prevented plaintiff from claiming unfairness at the hearing amounting to a violation of the Constitution. The Court noted that the Civil Service Commission did not have subpoena power to compel the attendance of witnesses, and

further noted that these foreign students were not under the control of the Air Force.

Cases which have found that due diligence had not been exercised to obtain the presence of an absent witness, have involved situations where the witness might have been in the jurisdiction (*Holman* v. *Washington*, 364 F. 2d 618 [5th Cir. 1966]; *Wilson* v. *Bowie*, 408 F. 2d 1105 [9th Cir. 1969]; and *Government of Virgin Islands* v. *Aquino*, 378 F. 2d 540, 551 [3rd Cir. 1967]). In *Aquino*, for example, the witness was a stewardess on a Norweigian freighter. The court there held:

> "So far as the record shows, therefore, the complainant might have been residing continuously in the Virgin Islands ever since the preliminary hearing was held. She might have been aboard a vessel which was in St. Thomas at the time of trial. *In these circumstances* it cannot be said that the prosecution satisfactorily established the burden which rested on it to show that she was *unavailable* at the time of trial." (emphasis added)

In the instant case, a sufficient showing of Holm's unavailability was made, in view of the more than 4,000 mile distance between Ekskogen, Sweden and the place of trial, and the witness' immunity from any form of process, intra or interstate.

The court below stated that it did not wish to "broaden the exception to the confrontation clause" relating to unavailable witnesses (27a). However, the Second Circuit's decision has *extended* the application of *Barber* to witnesses domiciled abroad, in relation to a trial occurring even before *Pointer* v. *Texas*, 380 U.S. 400 (1965)* in which (as shown below) no conceivable prejudice resulted from the use of the disputed testimony.

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* This Court stated in *Berger* v. *California*, 393 U.S. 314 (1968), that *Pointer* v. *Texas* foreshadowed the decision in *Barber*.

POINT II

Even assuming *arguendo* that due diligence requires a request to be sent to a witness domiciled on a foreign continent before his prior recorded testimony is admitted into evidence, the error in the case at bar would have been harmless.

Even assuming *arguendo* that the good faith efforts made by Tennessee at Stubbs' retrial were insufficient and that the rule of due diligence requires a request to be sent to a witness* permanently residing on a foreign continent, the error of reading the prior recorded testimony into the record at the retrial would have been harmless.

Analysis demonstrates that the outcome of the 1964 trial would beyond a reasonable doubt have been the same, whether the State had communicated with Mr. Holm or not. If a letter had been sent to the witness and he had refused to come to Tennessee, his prior testimony would have been read into the record at the second trial. If on the other hand he had agreed to undertake the trip despite his advanced age, it is wholly implausible to hypothesize that he would have testified differently as to the kidnapping and shooting of his wife and his own injuries especially since Stubbs' identity, the ownership of the gun, and the fact of the kidnapping were corroborated by Stubbs himself (81a, 96a).

It should be noted that respondent Stubbs took the stand at both trials, once when Mr. Holm testified in person and the second time when the testimony was read into the record. Counsel in 1954 and 1964 adopted this strategy. Thus, it is apparent that Stubbs would have testified in 1964 whether due diligence had resulted in Holm's appear-

* As previously noted, this Court in *Barber* referred solely to a request to "federal authorities," as did Judge Aldrich of the Tenth Circuit, who had dissented in *Barber* below. (381 F. 2d 479, 481 [1967]).

ance—which would have made Stubbs' testimony more imperative—or (as actually happened) in the reading of his prior testimony.

The court below set forth only one way in which the trial should have been handled differently by counsel—cross-examination of Holm as to whether Stubbs had "gained [the Holms'] sympathy during the course of the trip and in effect became their guest" (28a). This theory has no relation to respondent's due diligence claim. Even if Holm had returned to Tennessee, counsel at the 1964 trial did not indicate (contrary to the intimation in the decision below at 28a) that they would have questioned Holm about any increased amicability on his part or his wife's toward their kidnapper. The questions listed by them related to other matters (73a-74a).

Moreover, the "guest" theory is wholly refuted by the record. The reason why counsel in 1954 did not pursue this line of questioning is plain from Holm's testimony. Stubbs had stated that when he had his gun pointed at Mrs. Holm's face, she suggested that he keep it out of sight (97a), and that the Holms had promised to give him no trouble (84a). In order to dispel any intimation that the Holms had changed their attitude towards him, Mr. Holm was put on the stand in rebuttal and asked the following:

> "Mr. Holm, from the time that you left the roadside park until this occurrence near Blountville, was the relationship friendly between you and your wife and the defendant Stubbs or were you and Mrs. Holm afraid of him?" (104a)

He answered:

> "No, Sir, there was no friendly relations."*

* It is significant that 1964 defense counsel Mr. Haynes, far from indicating that he would have asked such a question, objected to this question and answer being admitted into evidence (104a).

This statement is corroborated by Stubbs' own testimony that he was hit on the head as they drove along (85a, 95a). It would therefore have been clearly inadvisable to elicit from Holm more testimony which would have undercut the defense theory still further, and fixed Holm's words in the jury's mind even more firmly.*

The court below rejected the application of harmless error in this case on the erroneous assumption that Holm was "not questioned" (28a) concerning the "guest" theory, which it characterized as having "some plausibility" (28a). In ruling that the 1964 record was insufficient to sustain the Tennessee conviction because an allegedly reasonable hypothesis as to the shooting might be conceived, the reasoning of the Second Circuit suggests an analogy to the rule that evidence is insufficient unless all reasonable hypotheses except guilt are excluded. See e.g. *Battles* v. *United States*, 388 F. 2d 799, 801-2, n. 3 and 5 (5th Cir. 1968).

However, four other circuits have held unequivocally that it is not necessary to preclude every plausible theory except guilt in order to uphold a conviction. *United States* v. *Boyle*, 402 F. 2d 757 (3rd Cir. 1968), *cert. denied* 394; *United States* v. *Chappell*, 353 F. 2d 83 (4th Cir. 1965); *United States* v. *Luxemberg*, 374 F. 2d 241 (6th Cir. 1967);

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*Trial practitioners avoid continuation of cross-examination under circumstances such as these. See "Preparation and Trial," by John Alan Appleman (1967 ed.), Chapter VIII, "Principles of Cross-Examination," Section 12: "Contrary to lay beliefs, a witness who knows what he is talking about and who testifies to the strict truth is not vulnerable to cross-examination. In the first place, most advocates are pretty conscientious men dedicated to the quest of justice. Even if it were possible to shake the testimony of such a person in some minor respect, or to embarrass him upon the stand, they would not feel that their duty to a client required a betrayal of their oaths as officers of the court. . . . But even those counsel who did not maintain a like standard of principles would find such a witness well able to handle himself, and a cross-examination under those circumstances would merely reiterate the testimony and create a greater impact upon the jury."

Bailey v. *United States*, 410 F. 2d 1209 (10th Cir. 1969), *cert. denied sub nom. Freeman* v. *United States*, 396 U.S. 933; *Early* v. *United States*, 394 F. 2d 117 (10th Cir. 1968), *cert. denied* 393 U.S. 1003; *Golubin* v. *United States*, 393 F. 2d 590 (10th Cir. 1968), *cert. denied* 393 U.S. 831. Indeed, the Second Circuit has rejected the *Battles* rule for federal criminal convictions (*United States* v. *Grunberger*, 431 F. 2d 1062) and thus the creation of such stringent requirements for cross-examinations in state court trials is unwarranted.

To rule that the claimed error at respondent's 1964 trial was not harmless because of the "guest" hypothesis, reduces to a nullity this Court's rationale in *Harrington* v. *California*, 395 U.S. 250 (1968). The failure to cross-examine as to a theory without any credible support in the record is not an error, cannot support a claim of error, and has no likelihood of having changed the outcome of respondent's trial.

POINT III

Since the tardy appointment of counsel at respondent Stubbs' first trial did not in fact deprive respondent of effective assistance of counsel, no Sixth Amendment right was violated by reading testimony recorded at this trial into respondent's retrial.

Respondent Stubbs' second trial for murder in Tennessee was necessitated because the United States District Court for the Middle District of Tennessee vacated Stubbs' first conviction, solely on the ground that counsel was tardily appointed.* Respondent erroneously concludes from this circumstance that even if due diligence were not in question, Holm's testimony would still have been inadmissible in 1964 because the right of confrontation was not orig-

* *Stubbs* v. *Bomar*, Civil Action, 3585 (M.D. Tenn., Filed Jan. 6, 1964).

inally satisfied. However, as was conceded by the Second Circuit in the case at bar, the Tennessee District Court decision in itself "would not establish the ineffectiveness of the cross-examination of Holm . . ." (28a).

Chambers v. *Maroney*, 399 U.S. 42 (1970) set out the applicable standard for determining whether tardy appointment of counsel has resulted in depriving a defendant of his right of confrontation. Such late appointment does not *per se* require reversal of every conviction, nor an evidentiary hearing to determine whether the right to counsel has been violated. It must be shown that prejudice to the defendant in fact resulted.

This Court noted in *Chambers* that there was no charge that counsel was "incompetent or inexperienced" (399 U.S. at 53). Nor has such a charge been made as to respondent Stubbs' first trial counsel. Respondent was represented by three attorneys, and the recorded testimony of Holm read in its entirety into the 1964 trial transcript (37a *et seq.*) demonstrates that the questioning of the complaining witness was capably handled.

Mr. McInturff and Mr. Taylor, who were among the three counsel in 1954, made numerous objections during the course of the direct examination of Mr. Holm. They objected to leading questions (41a, 46a, 47a); to physical descriptions of exhibits which might prejudice the jury (51a); to introduction of allegedly immaterial testimony calculated to build up sympathy for Holm (38a); to questions asked without proper foundation ("Wait a minute, there has been no statement that she said that") (49a); and to exhibits improperly offered into evidence ("We except to that unless it is shown that the conditions as portrayed in that picture existed on this day of June 10 or 11") (66a).

On cross-examination, counsel attempted to show that respondent had no intention of killing anyone. Mr. Taylor questioned Holm closely—"Now, at that time there was

nothing to have prevented him from killing you or killing your wife, if he had wanted to . . .?" (61a, 62a). Counsel also attempted to show that respondent's only motive was to get a ride, not burglary ("At no time on this trip did he make any demand for your money?") (63a); ("In fact, he told you and your wife both that all he wanted was a ride to Bristol . . .?") (64a).

That Holm did not change his story pursuant to these questions results not from any defect in the inquiries, but from the fact that Holm was a strong witness, bereaved and himself injured, with no motive to lie. No amount of preparation on counsel's part, such as research on Holm's past life, would have weakened this direct and uncomplicated testimony. Holm was, as Stubbs himself testified (80a), the victim of a coincidental meeting with Stubbs at a roadside picnic table.

It is also significant that the statements of respondent's later attorneys at the retrial as to how they would have handled the first trial on cross-examination (73a-74a) do not point up any significant errors in technique or strategy. Indeed, they adopted many of the 1954 objections which had been sustained (49a, 50a, 52a, 56a). Most of the suggestions offered by the later counsel involved merely trivial points, except that counsel would have asked Mr. Holm whether he was the beneficiary of his wife's life insurance. However, as a matter of trial strategy, counsel at the 1954 trial apparently felt that this would antagonize the jury. Mr. Holm had himself been shot twice in the face, and such an insult to him would only have emphasized his tragic situation.

While the court below did not suggest that Mr. Holm should have been asked about his wife's insurance, it found that the cross-examination was fatally defective because counsel had failed to question Mr. Holm as to whether the kidnapper had been made "welcome" at the end of their journey (28a). However, as previously

shown, Holm had testified that there were no friendly relations with Stubbs (104a); thus, exploration of this subject by defense counsel would also have been rejected on strategic grounds.

The standard by which the performance of counsel is to be assessed should not be one which requires minute inquiry into what counsel has done, or one which presumptively invalidates the performance of counsel. Representation should not be held inadequate unless it is "so lacking in competence that it becomes the duty of the court or the prosecution to observe it and correct it." *Williams* v. *Beto*, 354 F. 2d 698 (5th Cir. 1965); *Diggs* v. *Welch*, 148 F. 2d 667, 670 (D.C. Cir. 1945), *cert. denied* 325 U.S. 889.

Nothing in this Court's opinion in *Chambers* altered this standard, or created any presumption that counsel was ineffective because he was tardily appointed. Such a presumption would magnify claimed errors or disagreements with the judgment of counsel into constitutional defects simply by attributing them to lack of time to prepare. Indeed, precisely such a confusion in analysis occurred in the case at bar, where the Second Circuit apparently attempted to connect the absence of cross-examination on the "guest" theory to tardy appointment of competent counsel, even though questions as to whether the Holms had welcomed Stubbs would have needed no advance research time.

Respondent Stubbs' 1954 trial preserved not only the opportunity to cross-examine, but also all the other aspects of the right of confrontation. Stubbs and his counsel confronted Holm personally to test his recollection, to sift his conscience, to compel him to stand face to face with the jury so that his demeanor could be observed, and to compel him to testify under oath with knowledge of the penalties for perjury. See *California* v. *Green*, 399 U.S.

149 (1970). It is clear that the purpose of the Confrontation clause—"to advance a practical concern for the accuracy of the truth determining process"—(*Dutton* v. *Evans*, 400 U.S. 74 [1970]) was wholly fulfilled.

CONCLUSION

For all the foregoing reasons, the decision below should be reversed.

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Respectfully submitted,

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